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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of:

Reexamination of the Comparative
Standards for New Noncommercial
Educational Applicants

) MM Docket 95-31
)
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TO: The Commission

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COMMENTS OF
SOUTHWEST FLORIDA COMMUNITY RADIO, INC.
SIDE BY SIDE, INC., CHRISTIAN BROADCASTING ACADEMY,
LIVING FAITH FELLOWSHIP EDUCATIONAL MINISTRIES,
ILLINOIS BIBLE INSTITUTE, AND RADIO TRAINING NETWORK

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COMMENTS

Southwest Florida Community Radio, Inc., Side By Side, Inc., Christian Broadcasting Academy, Living Faith Fellowship Educational Ministries, the Illinois Bible Institute, and the Radio Training Network (Joint Commentors) file these comments in response to the *Notice of Proposed Rulemaking*, ___ FCC Rcd. ___, [FCC 95-79] (released March 17, 1995).¹ The *Notice of Proposed Rulemaking* seeks comment on possible modification of the criteria used to select the best applicant

¹ Southwest Florida Community Radio, Inc. is the licensee of WAYJ-FM, Fort Myers, Florida; WAYG-FM, Sarasota, Florida; WAYF-FM, West Palm Beach, Florida; and WAYM-FM, Columbia, Tennessee. Southwest is an applicant for a new station in Harvest, Alabama (Channel 201C3). Side By Side, Inc. is the licensee of WYSZ-FM, Maumee, Ohio and is an applicant for a new noncommercial station in Wauseon, Ohio. Christian Broadcasting Academy is the licensee of KLYT-FM, Albuquerque, New Mexico. Living Faith Fellowship Educational Ministries is the licensee of KRLF-FM, Pullman, Washington. The Illinois Bible Institute, Inc. is the licensee of WIBI-FM, Carlinville, Illinois; WPGL-FM, Champaign, Illinois; WNLD-FM, Decatur, Illinois; WCIC-FM, Pekin, Illinois; WSCT-FM, Springfield, Illinois; WCRT-FM, Terre Haute, Indiana; and is the licensee of commercial station WRVY-FM, Henry, Illinois. It has an application pending for a new noncommercial station in Carlinville, Illinois (Channel 211). Radio Training Network is the licensee of WLFJ, Greenville, South Carolina; WJIS, Bradenton, Florida; and WAFJ, Belvedere, South Carolina. Unless otherwise indicated, all of the above stations are noncommercial educational facilities.

among two or more competing applications for a new noncommercial educational broadcast station.² This rulemaking began in 1992 when the FCC initiated a general proceeding to explore criteria to select among mutually exclusive applicants for new broadcast facilities, including commercial and noncommercial stations. *See, Notice of Proposed Rulemaking in the Matter of Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd. 2664 (1992); *see also, Second Further Notice of Proposed Rulemaking*, 9 FCC Rcd. 2821 (1994). In the 1992 Notice, the FCC sought comment on whether it should consider using a modified version of the point system that it proposed for commercial applicants in comparing noncommercial educational applicants. The FCC further sought comment on: "(i) whether the criteria used to select commercial applicants were relevant in noncommercial educational (NCE) proceedings, (ii) whether different or additional criteria should be used, and (iii) whether a different comparative approach should be followed for state-owned public broadcasters as opposed to other NCE applicants." *Second Further Notice, supra* at ¶4.

In part due to the dearth of comments filed in response to the 1992 rulemaking, and in part in response to the comments made in that rulemaking, the FCC initiated the *Second Further Notice of Proposed Rulemaking, supra*. In the most recent rulemaking, the FCC seeks comment on:

1. Whether the existing NCE criteria should be retained or refined in any way?
2. Whether there are other factors, other than those proposed by earlier commentors, that should be considered and, if so, how should they be weighed?
3. Should a point system be adopted in place of the existing NCE comparative criteria? If so, are the criteria appropriate, and how should they be weighed?

² By *Order*, DA 95-893 (released April 21, 1995), the FCC extended the deadline for filing comments until May 15, and Reply Comments until May 31, 1995.

4. What, if any, factors should be employed as a "tie breaker"?
5. Should the following comparative criteria be adopted or modified in any way:
(i) favoring applicants with objectives that are directed outwardly to the listening community and not exclusively those of the licensee itself; (ii) favoring applicants with a governing board that is broadly representative to the community to be served; and (iii) favoring applicants who can demonstrate operating efficiencies through common ownership?
6. Do the factors identified in Paragraph 5 or a point system which takes into account diversification, minority control, spectrum efficiency, local program origination, local residence of principals, and a finder's preference, adequately accommodate the wide variety of applicants eligible to apply for NCE stations?
7. Should the point system as described in Paragraph 6 be adopted, and if so, how much weight should be given to the various criteria to be considered?
8. Is there a totally new proposal which would better assist in selecting among noncommercial applicants?
9. Should mandatory time share arrangements be retained as a means of resolving mutual exclusivity?
10. Should a different comparative approach be followed for state-owned public broadcasters?
11. Should the FCC impose a holding period for NCE stations granted as the result of a comparative hearing?
12. Should new criteria be applied to applicants already on file?

Comments.

Joint Commentors believe the current criteria for selecting NCE stations is unworkable. The standard comparative criteria added in NCE designation orders are nearly unintelligible.³ Case law offers little guidance in interpreting and applying the noncommercial comparative criteria. In fact, the Review Board in *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd. 2577 at n. 8 (1991), stated, "What precious little remains of the 'standard noncomparative issue' will make it difficult if not impossible, to expound a rational choice in most noncommercial licensing cases." See also, *Black Television Workshop*, 65 RR2d 34 at 35 (1984).

When NCE comparative criteria were first adopted by the FCC in *New York University*, 10 RR2d 215, 217 (1967), there was no rationale given for the distinction.⁴ Since then, the Commission has increasingly recognized that there is less and less of a distinction between NCE and commercial

³ Since 1988, NCE Hearing Designation Orders have included the following language:

1. To determine (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and if so, the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service;

2. To determine, in the light of the evidence adduced pursuant to the specified issues which of the applications should be granted, if any.

See, *Real Life Educational Foundation of Baton Rouge, Inc.*, 3 FCC Rcd. 4359 (MMB 1988).

⁴ The Commission simply noted, "In adopting these issues in this case of first impression, we further note that our standard comparative criteria (local residence, integration, broadcast experience, diversification, etc.) are virtually meaningless in a case of this type." *Id.* at ¶8. The Commission gave no explanation as to how or why the standard comparative criteria are virtually meaningless in NCE proceedings other than to note NCE's educational proposes.

stations. *See, Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants*, 58 FCC2d 526 (1976) ("Programming and other regulatory responsibilities [of NCE stations] are virtually indistinguishable from those obtaining to ordinary commercial stations"). *See also, Valley Broadcasters, Inc.*, 5 FCC Rcd. 2785, 2788 (1990)("In 1984 ... the Commission adopted an issue responsive programming rule for noncommercial educational stations that is essentially identical to that applicable to commercial radio stations."); *Public Broadcasting*, 98 FCC2d 746 (1984). The Commission also noted that NCE stations provide a broad range of services to the public beyond simply serving as a voice for an educational institution, as was the case in the early years of NCE broadcasting. *See, Public Radio and TV Programming*, 87 FCC2d 716 (1981); *Valley Broadcasters, Inc.*, *supra* (noncommercial educational stations have an obligation to serve the programming needs of their communities). The FCC has also recently eliminated the distinction between noncommercial and commercial signals in comparing the coverage between two mutually exclusive commercial applicants. *Channel 32 Broadcasting Company*, 6 FCC Rcd. 5188 (1991)("No legitimate public interest purpose would be served by exempting all noncommercial educational stations from consideration in the analysis of comparative coverage issues [in proceedings involving commercial applicants].")

Joint Commentors believe that clear-cut criteria should be developed and applied in evaluating noncommercial educational applicants. Some of those criteria have been used in commercial proceedings. These criteria should include the following:

1. Broadcast Experience.

This is a criteria, of course, that has been used in the past in comparative proceedings with commercial stations. *See, Policy Statement*, 1 FCC2d 393 (1965); *Northern Sun Corp.*, 100 FCC2d

889, 892 (Rev. Bd. 1985). It is a standard that is easily applied and there is a body of precedent which would assist in evaluating the comparative strengths and weaknesses of any claimed credit for broadcast experience.

Broadcast experience is clearly relevant to the operation of a station. An experienced broadcaster is far less likely to make the type of mistakes that often lead a new station to financial disaster, ultimately denying the public of the service intended. Indeed, even the Court of Appeals in *Bechtel v. FCC*, 10 F.3d 87 (D.C. Cir. 1994) seemed to acknowledge broadcast experience as a predictive factor in evaluating future service to the public.⁵ There is no readily discernable reason why broadcast experience should not be considered as a factor in evaluating NCE applicants. As discussed above, the distinction between NCE and commercial stations has been narrowing over the years. The importance and relevance of broadcast experience is just as apparent in NCE operations as it is with commercial stations.

Many, if not most, NCE applicants are not-for-profit corporations controlled by a Board of Directors. The experience of each board member would be considered in analyzing the overall broadcast experience of such an applicant. In the case of an application submitted by an educational institution, the broadcast experience of its governing body would be reviewed. The individuals to be earmarked for broadcast experience would be earmarked in much the same way they were identified for integration credit in the standard comparative proceedings. See, *Reginald A. Fesenden Educational Fund, Inc.*, 100 FCC2d 440 (Rev. Bd. 1985); *Roanoke Christian Broadcasting, Inc.*, 92 FCC2d 1477 (Rev. Bd. 1983), c.f. *Farragut Television Corp.*, 8 FCC2d 279, 282 (1967), at ¶¶8-9.

⁵ "At the outset, one might question the Commission's decision to stress an owner's interest in station operations over other factors, such as his skill or his experience." *Bechtel v. FCC, Id.*

2. Comparative Coverage and Other Engineering Factors.

An applicant with a superior technical proposal should be awarded a preference. A superior proposal would offer service to more people and/or provide service to underserved areas, or provide a first-time local service to a community with no broadcast outlets. Existing case precedent both in noncommercial and commercial proceedings would serve as a guide for the degree of credit awarded with one exception. Instead of award of only a very slight preference for a difference in overall population coverage of 5 percent or more, the preference should be at least slight. Consideration of these criteria would encourage applicants to propose facilities to serve the greatest number of people, which is in the public interest.

3. Diversification.

Diversification should play a role in the evaluation of mutually exclusive noncommercial applications. Diversification has, of course, always been a factor in evaluating applicants for commercial stations. The Commission considers diversification to be a factor of primary significance in evaluating commercial applicants. *Policy Statement on Comparative Broadcast Hearings, supra*, at 394 (1965). The Supreme Court has noted that, "The widest possible dissemination of information from diverse antagonistic sources is essential to the welfare of the public." *Metro Broadcasting v. FCC*, 497 U.S. 547, 567, (1990). The Court has further noted that, "The Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978). *See also, Comparative Renewal Process*, 3 FCC Rcd. 5179 (1988).

The Commission has already assessed demerits for ownership interests in noncommercial stations in a comparative proceeding for a new commercial FM frequency. In *Advanced Broadcast Technologies*, 5 FCC Rcd. 765 (1990), a comparative diversification demerit was assessed against Pennsylvania State University for its ownership of a noncommercial FM facility in a comparative contest for a new commercial FM frequency.

Joint Commentors propose that any applicant that has media interests in twelve or more other stations should be assessed a demerit. The demerit should be weighed based on the same type of analysis used in weighing media interests in comparative proceedings for commercial stations. The greater the number of other broadcast interests, the greater the demerit. Also, the weight would increase based on the location of the other media interests. The closer the stations to the proposed applicant's city of license, the greater the demerit.

Taking into account other media interests of NCE applicants with twelve or more other media interests would allow greater diversity. It would also help stem the tide of a few noncommercial broadcasters from acquiring a disproportionate amount of NCE spectrum. These are the NCE broadcasters that operate dozens of stations and have pending dozens more applications for new stations.

4. Financial.

Although FCC Form 340, Section 3, Financial Qualifications, requires an NCE applicant to certify that it has sufficient net liquid assets on hand or available from committed sources to construct and operate the station for three months without additional funds, undersigned counsel is aware of no case where a noncommercial applicant's financial qualifications have ever been questioned. On the other hand, the financial qualifications of applicants for commercial stations are frequently at issue. It is probable, therefore, that many noncommercial applicants are also not

financially qualified but the fact goes undetected. The FCC Form 340 should require more information concerning an applicant's financial qualifications if an applicant has more than six applications pending. The FCC should require applicants with more than six pending applications to provide an affirmative showing of the applicant's financial capability of constructing and operating each of the stations.⁶ This factor would not be a comparative factor but a qualifying factor. An applicant that is not financially qualified would be dismissed.

5. Hours of Operation.

Comparative preferences should be awarded for significant differences in the proposed hours of operation. The hours of operation should be specified in the application. In commercial comparative proceedings, the Commission has acknowledged the benefit of a proposal offering significantly more programming *See, Minneapolis Star and Tribune Company*, 88 FCC2d 1604, 1612 (Rev. Bd. 1982).

6. Tie Breakers.

If, and only if, an NCE comparative case cannot be decided based on the factors above, then the FCC should give consideration to the following factors as tie breakers: (1) first to file; and (2) the amount of programming specifically produced and aired for the contemplated new station's service area. It is appropriate in a tie breaker situation to give credit to the applicant that had the initiative to first identify and file for an available NCE allocation. Likewise, in a tie breaker situation, it is appropriate to give credit for programming specifically produced for the service area. The rationale for crediting this type of programming is that it is arguably more uniquely fashioned to address area needs and, therefore, serve the listening public.

⁶ Translator stations and applications would not be counted as either media interests or pending applications.

7. Other Matters.

7.1 The FCC Should Not Adopt a Point System.

Allocation of points would very likely oftentimes result in an unfair ranking of noncommercial applicants. If points are to be awarded, for example, for diversification demerits, it would be unfair not to recognize the extent of other media interests. Clearly, ownership and other media interests in the same market should be treated differently than a minority interest in a station thousands of miles away. Similarly, there are differences in the degree of credit to be awarded for broadcast experience, engineering proposals and, for that matter, every comparative criteria except perhaps the award of credit for being the first to file for an allocation.

7.2 Application of New Criteria.

An opportunity should be afforded for all pending NCE applicants to file one amendment responsive to whatever new criteria are adopted by the FCC. The amendment should be specifically limited to the new criteria adopted.

7.3 Holding Period.

Adoption of any comparative criteria by the FCC would be meaningless if some sort of holding period for any applicant that prevails based on the criteria is not imposed. A minimal one-year holding period should be imposed with the additional caveat that, if a station is sold (absent a compelling reason) during the second year of operation, the sale of the station should be considered as a negative in any future comparative proceedings involving that licensee. Imposition of a demerit in other comparative proceedings for sale of the station during the second year of operation would address, in part, the Court's concern in *Bechtel II, supra*. There, the Court faulted the Commission for awarding credit for so-called permanent integration where there was no mechanism to ensure that

the integration proposals would in fact remain permanent and there was no record of even one instance where proposed integration was adhered to on a long-term bases.

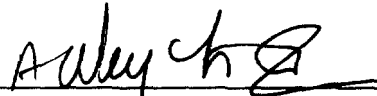
**7.4 No Different Comparative Criteria Should Be
Applied to State-Owned Public Broadcasters.**

No different comparative approach, and certainly no preference, should be awarded in cases where state-owned public broadcasters are applicants for noncommercial frequencies. Indeed, for the federal government to give some sort of preference or different treatment to an applicant affiliated with a governmental entity smacks of big brother in promoting a government voice. Such a preference may violate the Constitution by chilling First Amendment free speech rights of private entities. Speech associated with state-owned broadcasters should not be preferred over the speech of broadcasters solely dependent on listener donations and other private funding sources.

Respectfully submitted,

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